LEAGUE OF MINNESOTA CITIES

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of

WT Docket No. 08-165

Petition for Declaratory Ruling to Clarify Provisions of Section 332(c) (7) (B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance

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COMMENTS OF THE LEAGUE OF MINNESOTA CITIES

These Comments are filed by the League of Minnesota Cities (League) to urge the Commission to deny the Petition filed by CTIA-the Wireless Association. As further explained below, the CTIA's petition is without merit or basis in law or fact. The League also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") and the National League of Cities ("NLC") in response to CTIA's Petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. Section 332(c) (7) (B) governs wireless tower sitings to the exclusion of Section 253.

Section 332 is clear and unambiguous with respect to the importance that Congress placed on local zoning with respect to wireless tower citing decisions. In particular Section 332 (c) (7) (A) provides:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

The law very specifically describes the limited circumstances in which local zoning authority is circumscribed. In particular Section 332(c) (7) (B) provides:

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(i) The regulation of the placement, construction, and modification of personal wireless services facilities by any State or local government or instrumentality thereof –

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and
(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) As State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

Moreover, Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis.

The specificity of these remedies demonstrates Congress' intent to limit the Commission's authority. In fact, only in a very narrow category of claims, has Congress conferred jurisdiction on the Commission. (See, 332 (c) (7) (B) (v) ". . . Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief. (Emphasis added)) Accordingly, there is not doubt that Section 253 of Title 47 of the United States Code does not apply to wireless tower siting proceedings.

In addition, Congress is explicit about the fact that the time frame for local government to respond to applications for wireless facility sitings is dependent on the "nature and scope" of the request. Accordingly, any effort to establish a fixed and uniform time frame within which to act would be contrary to clear Congressional intent and beyond the Commission's authority.

Beyond the jurisdictional limitations discussed above, to assist the Commission in its evaluation, below are details specific to wireless facilities siting process and experience in cities and other local jurisdictions in Minnesota:

1. LEGAL REQUIREMENTS FOR FACILITY SITING

In some jurisdictions, applications for facility siting may be addressed administratively, without the need for public hearings; others are required by state and local law to follow certain processes and procedures.

The City of Bloomington, MN often takes less than 45 days to review a request for co-location, usually acting within 1-5 days. A 45-day co-location review time limit would, in practice, require cities to approve applications through the administrative process rather than using a hearing process. This contravenes current flexibility under Minnesota state law that allows cities, such as the near-by City of Minnetonka, to require such applications to go through the full hearing process. In those instances, a 45-day time limit would be problematic.

For the approval of applications for siting of monopoles, a 75-day timeframe for final action would be even more problematic for cities. It is generally the case that cities require a public hearing process for such applications. Even without a continuance, it is likely that the process would exceed 60 days. With even one continuance, cities could easily exceed 75 days; thus be unable, under the terms of the petition submitted by the CTIA, to continue a review of an application for a monopole facility siting. It is important to emphasize that Minnesota state law allows 120 days for the completion of final action using this process.

The time constraints proposed in the CTIA petition do not anticipate that applicants would be able to request an extension of the time period in writing as Minnesota State Law also allows, within the final 120-day timeframe. The League suggests that even the CTIA would favor the flexibility of applicants being able to extend the timeline if they so choose. If the city indicates that it cannot approve the facilities siting application, but would be able to do so if the applicant revises it to address specific issues, the choice would be for the applicant to revise or face a denial of the application. Without the authority and flexibility to extend the restricted timeframe, the applicant would likely receive a denial (given the inadequate time to meet a strict timeline) and face the prospect of beginning the process again.

The League also concurs with comments submitted by the Olmsted County Board of Commissioners, Olmsted County, Minnesota, which include reference to current Minnesota Statute 15.99, Subd. 2 (the "60-day rule") which provides that local units of government, including cities, must approve or deny a written request related to zoning for government denial of an action, such as an application for siting wireless facilities, within 60 days. Failure to deny a request on within that time period is deemed approval of the request. This legal requirement imposed by state statute adequately protects the interests of applicants for wireless facilities siting.

The treatment of wireless tower and facilities siting applications as a conditional use permit as also noted in the comments by Olmsted County is akin to the provisions in city zoning ordinances for the siting of such facilities, and the scheduling of the requisite planning commission hearings would likewise mean that occasionally such hearings will not be possible to schedule to meet the shorter 45-day time frame proposed in the CTIA petition. This would result in automatic approval under one version of the proposed rules. in the same manner as it is stated in the comments by the Olmstead County Board of Commissioners. In many smaller cities, such meetings are held only once a month, making it even more difficult to adhere to the proposed tighter timeframes.

And much the same as the comments by Olmsted County set forth, cities in Minnesota often require co-location whenever there is an approved wireless provider with an existing tower. It is not our experience to have cities deny applications involving co-location in those instances. But there may be a reasonable basis to deny an application for a separate tower serving a similar service area, based on the considerations set forth in the Olmsted County comments.

CTIA further requests the Commission to implement procedures whereby, if a zoning authority fails to act within the timeframes, the application is "deemed granted" or that the Commission establish a presumption that entitles the applicant to a court-ordered injunction granting the application unless the zoning authority can justify the delay. Such overly broad and far-reaching rules would remove the rationale or feasibility of applicants and local jurisdictions working to resolve the aspects of the application that may be modified and make it possible for the city to take final action to approve the facilities siting application.

The League is not aware of instances in which cities in Minnesota have required a wireless service provider to prove lack of service by any other provider before being allowed to locate on a site for which the provider has applied. But another unintended consequence could result if the Commission grants the CTIA petition to bar cities from making zoning decisions that have the effect of preventing a specific provider from providing service to a location on the basis of another provider's presence there. Cities that limit the number of monopoles to one per site in circumstances in which only one commercial site surrounded by residential sites already has a monopole located at that site and is, in fact, full to the capacity of the space available, a provider could easily argue that such provisions prevent them from providing service on the basis of another provider's facilities at the site.

As is evidenced from these examples, state zoning provisions and local zoning regulations in Minnesota require certain notice and public hearings to ensure that the rights of the applicant and the public are preserved. These are found in the following state and local codes:

- Minnesota Statute Section 462.357 subd. 3 (https://www.revisor.leg.state.mn.us/statutes/?id=462.357)

- Minnesota Statute Section 462.3595 subd. 2 (https://www.revisor.leg.state.mn.us/statutes/?id=462.3595)

As a result, cities in Minnesota are required to comply with notice as well as publication requirements for such hearings.

2. CONCLUSION.

In conclusion, the Commission does not have authority to issue the declaratory ruling requested by the CTIA as it would be contrary to the intentions of Congress as previously

stated. Further, the current process for addressing applications for use of land within the local jurisdiction ensures that the rights of the residents of our communities to govern themselves and ensure appropriate development of the community are balanced with the interests of all applicants. The current process works well, and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can be and are adequately addressed through the local election process in each community and in the courts. Intrusion by a federal agency in this circumstance is neither warranted nor authorized.

Respectfully submitted on behalf of the
League of Minnesota Cities,

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